Foo Poh Sang & Ors v Lim Teik Cheong (representative of the estate of Lim Seong Chun, deceased)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–403 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
29 JUNE 2006

Civil Procedure — Want of prosecution — Striking out for want of prosecution — Delay in effecting substitution of deceased defendant — Whether there had been inordinate and inexcusable delay — Whether defendant also guilty of delay in proceeding — Whether court should exercise to allow application

In February 1983, the defendant solicitor (now deceased) prepared a sale and purchase agreement between the plaintiffs and a third party. The plaintiffs' case was that the solicitor was negligent and in breach of the fiduciary duties he owed the plaintiffs. They brought an action against the solicitor in November 1988. Pleadings were exchanged. Then, in February 1994 the deceased passed away. It was not until 2½ years later in June 1996 that the plaintiffs effected substitution of the deceased solicitor's personal representative and made the appropriate amendments to the cause papers. On 13 September 1996, the defendant's estate took out a summons to strike out the action for want of prosecution. This was allowed by the registrar and an appeal to the judge failed. The plaintiffs then appealed to the Court of Appeal.

Held, allowing the appeal:

(1) Delay in the due prosecution of an action is a matter to be treated with severity in appropriate cases. However, everything depends on the facts and circumstances of each case. The power to strike out a case for want of prosecution (whether at first instance or in appeals) should be invoked only in the clearest of cases (see para 6); *Vasudevan v T Damodaran* [1981] 2 MLJ 150 followed.

(2) The plaintiffs had done all in their power to expedite the hearing of their case. The delay in the prosecution of the action had been occasioned not by the plaintiffs but by the defendant's request for an adjournment (see paras 3, 5).

(3) The high degree of culpability called for to warrant a striking out was absent in this case. Although the judge referred to all the relevant principles he failed to have regard to the peculiar facts of the present case when applying them. The court had failed to take into account relevant considerations when exercising its discretionary power to strike out (see para 8).

[Bahasa Malaysia summary

Pada Februari 1983, peguam defendan (sekarang telah meninggal dunia) telah menyediakan perjanjian jualbeli antara plaintif-plaintif dan pihak ketiga. Kes plaintif-plaintif adalah bahawa peguam tersebut telah cuai dan melanggar tanggungjawab fidusiarinya terhdap plaintif-plaitnif. Mereka telah memulakan tindakan terhadap peguam itu pada November 1988. Pertukaran pliding telah dilakukan. Kemudian, pada Februari 1994 si mati telah meninggal dunia. Dua setengah tahun kemudian barulah plaintif-plaintif menggantikan representasi peribadi peguam si mati dan membuat pindaan yang sesuai terhadap kertas kausa. Pada 13 September 1996, harta pusakan defendan mengemukakan saman untuk membatalkan tindakan kerana inginkan pendakwaan. Ini dibenarkan oleh pendaftar dan rayuan kepada hakim gagal. Plaintif-plainti kemudiannya merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Kelewatan dalam pendakwaan suatu tindakan adalah satu perkara yang dianggap serius dalam kes-kes tertentu. Namun, semuanya bergantung kepada fakta dan keadaan setiap kes. Kuasa untuk membatalkan kes kerana inginkan pendakwaan (sama ada pada awalnya atau dalam rayuan) hendaklah digunakan hanya dalam kes-kes yang jelas (lihat perenggan 6); *Vasudevan v T Damodaran* [1981] 2 MLJ 150 diikut.

(2) Plaintif-plaintif telah melakukan segala dalam kuasa mereka untuk mempercepatkan perbicaraan kes mereka. Kelewatan pendakwaan tindakan telah berlaku bukan oleh kerana plaintif-plaintif tetapi oleh permintaan defendan untuk satu penangguhan (lihat perenggan 3, 5).

(3) Tahap kebersalahan tinggi yang perlu dibuktikan untuk mewajarkan satu pembatalan tidak dalam kes ini. Meskipun hakim merujuk kepada semua prinsip-prinsip yang relevan beliau gagal untuk mengambilkira fakta-fakta tersendiri kes semasa apabila menggunakannya. Mahkamah telah gagal untuk mengambilkira pertimbangan yang relevan apabila menggunakan kuasa budi bicaranya untuk membuat pembatalan (lihat perenggan 8).]

Notes

For cases on striking out for want of prosecution, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6987–7015.

Cases refered to

Vasudevan v T Damodaran [1981] 2 MLJ 150 (folld)

Appeal from: Civil Suit No 22–202 of 1988 (High Court, Ipoh)

Gurbachan Singh (Bachan & Kartar) for the appellants.
VS Viswanatahan (AS Vengadeswaran with him) (Lim Seong Chun & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is an appeal against the order of the High Court at Ipoh striking out an action for delay in prosecuting it. The cause of action is based on the tort of professional negligence and also for breach of fiduciary duties. The facts are not in dispute and may be shortly stated.

[2] In February 1983, the defendant solicitor (now deceased) prepared a sale and purchase agreement between the plaintiffs and a third party. The plaintiffs' case is that the solicitor was negligent and in breach of the fiduciary duties he owed the plaintiffs. They brought an action against the solicitor in November 1988. Pleadings were exchanged. Then, in February 1994 the deceased passed away. It was not until 2½ years later in June 1996 that the plaintiffs effected substitution of the deceased solicitor's personal representative and made the appropriate amendments to the cause papers. But, as will appear shortly, nothing turns on this delay. On 13 September 1996 the defendant's estate took out a summons to strike out the action for want of prosecution. This was allowed by the registrar and an appeal to the judge failed. The plaintiffs then appealed to us.

[3] In his written judgment, the learned judge found the plaintiffs guilty of inordinate delay in prosecuting the claim. The plaintiffs criticise this finding. They complain that the judge did not take into account facts which establish that the delay in the trial of this case was in fact caused by the defendants. The evidence on the point is documentary and beyond dispute. There are four documents in all. The first is a letter dated 29 April 1993 from the plaintiffs' solicitors to the senior assistant registrar of the Ipoh High Court. That letter requests the court for an early date for the fixing of the case. You must remember that when this letter was written the provisions for case management had not been introduced. What you had to do was to file a Notice of Trial and an Entry of Trial forms. The latter requested the court to enter the action for trial and the former had a space for a date on which the cases on a published Fixing List would be mentioned either before the registrar or sometimes even before a judge. So, if you look at the letter against this background, the plaintiffs had done all in their power to expedite the hearing of their case.

[4] The next document is dated 24 July 1993. It is a notice from the court to the parties informing them that the suit had been fixed for hearing on 10 January 1994. It appears from the record that on 17 December 1993 the defendant's solicitors wrote to the court to vacate 10 January 1994. This is reflected in the letter dated 6 January 1994 from the court to the parties informing them that the defendant's application had been granted. Then, on 21 January 1994 the plaintiffs' solicitors wrote to the court requesting for the suit to be fixed for hearing and giving their free dates. The rest was silence.

[5] It is a fair inference from the evidence referred to a moment ago that the delay in the prosecution of the action had been occasioned not by the plaintiffs but by the defendant's request for an adjournment. Yet this vital fact finds no mention in the

lengthy judgment of the judge. As for the 2½ year delay in the substitution of the defendant's estate, a reading of the judgment appealed against does not show that it operated on the judge's mind.

[6] We are entirely conscious that delay in the due prosecution of an action is a matter to be treated with severity in appropriate cases. Of course everything depends on the facts and circumstances of each case. And we must emphasise that whilst it is a stark reality that our courts are burdened with a heavy caseload awaiting disposal, the Draconian power to strike out a case for want of prosecution (whether at first instance or in appeals) should be invoked only in the clearest of cases. It should not in any event be used as an easy option to clear the backlog in our courts.

[7] The principles governing the exercise of this power are now well settled and are set out in the judgment of Abdoolcader J in *Vasudevan v T Damodaran* [1981] 2 MLJ 150 (at pp 150–151):

> The House of Lords in *Birkett v James* [1978] AC 297, 317, 326 approving the decision of the English Court of Appeal in a trilogy of appeals reported sub nomine *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245, 268, held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiff's part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House further observed *per curiam* that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules of court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action.

[8] Needless to say the high degree of culpability called for to warrant a striking out is absent in this case. The plaintiffs' complaint is that although the judge referred to all the relevant principles he failed to have regard to the peculiar facts of the present case when applying them. We think that there is merit in this complaint as we have attempted to demonstrate in this judgment. This is accordingly a case in which the court below failed to take into account relevant considerations when exercising its discretionary power to strike out. Accordingly, this is a case in which appellate intervention is clearly warranted.

[9] For the reasons already given, the appeal was allowed and the appropriate directions for an early disposal of the action were given. We also ordered that the costs thus far incurred do follow the event of the trial. The deposit was ordered to be refunded to the plaintiffs (appellants).

Appeal allowed.

Reported by Peter Ling